

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 JANA A.,

10 Plaintiff,

Case No. C19-5722 MLP

11 v.

ORDER

12 COMMISSIONER OF SOCIAL SECURITY,

13 Defendant.

14 **I. INTRODUCTION**

15 Plaintiff seeks review of the denial of her application for Supplemental Security Income  
16 and Disability Insurance Benefits. Plaintiff contends the administrative law judge (“ALJ”) erred  
17 at steps two, three, and five of his decision, and in assessing her residual functional capacity  
18 (“RFC”) and the medical opinion evidence. (Dkt. # 14 at 2.) As discussed below, the Court  
19 REVERSES the Commissioner’s final decision and REMANDS the matter for further  
20 administrative proceedings under sentence four of 42 U.S.C. § 405(g).

21 **II. BACKGROUND**

22 Plaintiff was born in 1970, has a high school diploma and some college education, and  
23 has worked as a military contractor overseas; in retail, human resources, and scheduling jobs at

1 Home Depot; and as a cashier. AR at 24, 43-67. Plaintiff was last gainfully employed in August  
2 2015. *Id.* at 321.

3 In May 2016, Plaintiff applied for benefits, alleging disability as of August 23, 2015. AR  
4 at 265-72. Plaintiff's applications were denied initially and on reconsideration, and Plaintiff  
5 requested a hearing. *Id.* at 171-79, 182-96. After the ALJ conducted a hearing on March 6, 2018  
6 (*id.* at 34-108), the ALJ issued a decision finding Plaintiff not disabled. *Id.* at 15-26.

7 Utilizing the five-step disability evaluation process,<sup>1</sup> the ALJ found:

8 Step one: Plaintiff has not engaged in substantial gainful activity since the alleged onset  
9 date.

10 Step two: Plaintiff's lumbar spine degenerative disc disease, generalized anxiety disorder,  
11 major depressive disorder, obesity, and post-traumatic stress disorder are severe  
12 impairments.

13 Step three: These impairments do not meet or equal the requirements of a listed  
14 impairment.<sup>2</sup>

15 RFC: Plaintiff can perform sedentary work with additional limitations: she can never  
16 climb ladders, ropes, or scaffolds, but can occasionally climb ramps and stairs. She can  
17 occasionally perform other postural activities such as balancing, stooping, kneeling,  
18 crouching, and crawling. She can have occasional use of foot controls bilaterally, and can  
19 have occasional exposure to vibration and extreme cold. She can understand, remember,  
20 and apply detailed, but not complex, instructions. She cannot work in a fast-paced,  
21 production-type environment.

22 Step four: Plaintiff cannot perform past relevant work.

23 Step five: As there are jobs that exist in significant numbers in the national economy that  
Plaintiff can perform, Plaintiff is not disabled.

AR at 15-26.

---

<sup>1</sup> 20 C.F.R. §§ 404.1520, 416.920.

<sup>2</sup> 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 As the Appeals Council denied Plaintiff's request for review, the ALJ's decision is the  
2 Commissioner's final decision. AR at 1-6. Plaintiff appealed the final decision of the  
3 Commissioner to this Court.

### 4 III. LEGAL STANDARDS

5 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social  
6 security benefits when the ALJ's findings are based on legal error or not supported by substantial  
7 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a  
8 general principle, an ALJ's error may be deemed harmless where it is "inconsequential to the  
9 ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
10 (cited sources omitted). The Court looks to "the record as a whole to determine whether the error  
11 alters the outcome of the case." *Id.*

12 "Substantial evidence" is more than a scintilla, less than a preponderance, and is such  
13 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
14 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th  
15 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical  
16 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d  
17 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may  
18 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v.*  
19 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one  
20 rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

## 1

## 2

3  
4  
5  
6  
7

8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
20

## 21

22  
23

1 12.04, 12.06, or 12.15, a claimant must satisfy either paragraphs A and B or paragraphs A and C.  
2 *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00A(2). In this case, the ALJ found that Plaintiff  
3 did not satisfy a listing for her mental impairments because she did not satisfy the “paragraph B”  
4 criteria, given that none of her functional limitations were found to be marked or extreme. AR at  
5 19. Plaintiff contends that the ALJ should have found that her limitations in her ability to interact  
6 with others should have been rated “extreme,” rather than “mild.”

7 At step three, the ALJ explained why he found Plaintiff’s social limitations to be mild:

8 The claimant testified that after she left her job, she felt like she could not deal with  
9 people. However, she then went on to work at a gas station. When questioned about  
10 how she was able to deal with people at the gas station, she stated that she did not  
11 want to, but she did it because she had to for her job. This shows that the claimant  
12 does have an ability to interact with others when needed for a job. The claimant  
13 also indicated that she keeps in touch with friends occasionally and keeps contact  
14 with her family in Georgia about twice a month ([AR at 426]). She has a stable  
15 relationship with her fiancé, which she has maintained throughout the period at  
16 issue. She likes getting out and going to yard sales (*id.* at 698]). She has reported  
17 going to Bingo once a month (*id.* at 286]). She indicated that her friends do most  
18 of her shopping due to not being able to walk for a long time (*id.* at 285]).

14 AR at 19. Plaintiff argues that the activities cited by the ALJ do not show that she can interact  
15 with the public in a work setting on a sustained basis.

16 In disputing the ALJ’s interpretation of the evidence, Plaintiff relies on her reports of  
17 problems grocery shopping or being at the mall, as evidence that her social limitations are more  
18 severe than “mild.” (Dkt. # 14 at 9 (citing AR at 86, 1080, 1088).) Plaintiff also argues that her  
19 ability to interact with her significant other and her family is irrelevant, and that her yard sale  
20 shopping and Bingo did not necessarily involve much social interaction. (*Id.* at 11.) Plaintiff also  
21 contends that the ALJ erred in relying on her ability to interact in her gas station job, given that  
22 she worked at that job prior to her alleged onset of disability. (*Id.* at 9.)  
23

1 Plaintiff worked at the gas station in the months leading up to her alleged disability onset,  
2 which is admittedly not during the adjudicated period, but Plaintiff testified that she left the gas  
3 station job due to her physical issues rather than because of her ability to interact with people.  
4 AR at 66-67, 75-76. Thus, Plaintiff's demonstrated ability to interact with people in this job is  
5 relevant to her ability to interact with people during the adjudicated period, given that there is no  
6 evidence that Plaintiff's social abilities diminished at the time of her alleged onset. The ALJ  
7 reasonably presumed that Plaintiff continued to be able to interact to the degree she had been  
8 able to interact before her alleged onset date. Although Plaintiff claims in her reply brief that her  
9 "conditions deteriorated as she was increasingly unable to maintain work" (dkt. # 16 at 3), she  
10 cites no objective evidence supporting a contention that her social limitations became more  
11 severe during the adjudicated period. As discussed *infra*, the ALJ discounted Plaintiff's self-  
12 reports and thus any reference to her own statements of worsening social limitations is  
13 unavailing here.

14 Moreover, to the extent that Plaintiff points to evidence that purportedly conflicts with  
15 the ALJ's finding of "mild" social limitations: the Court declines Plaintiff's invitation to reweigh  
16 the evidence in a manner more favorable to Plaintiff. To the extent that the record contains  
17 conflicts regarding the extent of Plaintiff's social capabilities, it is the ALJ who is tasked with  
18 resolving those conflicts and Plaintiff has not shown that the ALJ's step-three findings are  
19 unsupported by substantial evidence. *See Treichler v. Comm'r of Social Sec. Admin.*, 775 F.3d  
20 1090, 1098 (9th Cir. 2014) ("[W]e leave it to the ALJ to determine credibility, resolve conflicts  
21 in the testimony, and resolve ambiguities in the record."). Plaintiff has not shown that the ALJ's  
22 finding that the record supported a finding of "mild" social limitations was unreasonable, and  
23 Plaintiff has therefore failed to establish error in the step-three findings.

1           **C.       The ALJ Did Not Err in Assessing the Medical Opinion Evidence**

2           Kimberly Wheeler, Ph.D., performed psychological evaluations of Plaintiff in 2016 and  
3 2018 and completed DSHS form opinions describing her symptoms and limitations. AR at 425-  
4 29, 1087-91. The ALJ summarized Dr. Wheeler’s findings and gave them little weight, finding  
5 the 2016 conclusions to be inconsistent with the “generally intact” mental status examination. *Id.*  
6 at 23. The ALJ discounted the 2018 conclusions as inconsistent with the mental status  
7 examination, which was mostly within normal limits, and because Dr. Wheeler’s opinion was  
8 based largely on Plaintiff’s non-credible subjective reports. *Id.*

9           Plaintiff argues that an examining psychologist must rely on a claimant’s subjective  
10 reports in evaluating his or her complaints. (Dkt. # 14 at 13.) That may be true, but that is why an  
11 ALJ’s evaluation of the reliability of Plaintiff’s allegations is so crucial in a case involving  
12 psychological impairments. Here, the ALJ explained that he discounted Plaintiff’s subjective  
13 reports because she had limited treatment for her physical and mental issues, and because her  
14 activities of daily living were inconsistent with the allegations. AR at 21-22. Plaintiff does not  
15 assign error to the ALJ’s assessment of her subjective reporting (dkt. # 14 at 2), which is fatal to  
16 her argument here because Dr. Wheeler’s opinion report repeatedly quotes Plaintiff’s subjective  
17 reporting. *See, e.g.*, AR at 1088 (“clinical findings” section consisting of self-report). Given that  
18 the ALJ discounted Plaintiff’s subjective reporting, which Plaintiff does not challenge, the ALJ  
19 was entitled to discount Dr. Wheeler’s opinion based on her reliance on Plaintiff’s self-reporting.  
20 *See Bray v. Comm’r of Social Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (“As the district  
21 court noted, however, the treating physician’s prescribed work restrictions were based on Bray’s  
22 subjective characterization of her symptoms. As the ALJ determined that Bray’s description of  
23

1 her limitations was not entirely credible, it is reasonable to discount a physician's prescription  
2 that was based on those less than credible statements."").

3 Plaintiff goes on to suggest that the mental status examinations bear no relevance to Dr.  
4 Wheeler's conclusions, and thus the ALJ erred in discounting Dr. Wheeler's opinions based on  
5 purported inconsistency between them. (Dkt. # 14 at 13.) This argument is not persuasive,  
6 because the mental status examinations addressed, for example, Plaintiff's memory and  
7 concentration abilities, which are relevant to Plaintiff's ability to remember instructions. *See* AR  
8 at 427, 429, 1089, 1091. Dr. Wheeler found Plaintiff's memory and concentration to be intact,  
9 and yet found Plaintiff to be moderately limited in her ability to understand, remember, and  
10 persist in tasks by following detailed instructions. *Id.* The ALJ did not err in finding these aspects  
11 of Dr. Wheeler's opinions to be inconsistent, or in discounting them on that basis. *See Morgan v.*  
12 *Comm'r of Social Sec. Admin.*, 169 F.3d 595, 603 (9th Cir. 1999) (ALJ appropriately considers  
13 internal inconsistencies within and between physicians' reports).

#### 14 **C. The ALJ Did Not Err in Assessing Plaintiff's RFC**

15 Plaintiff argues that the ALJ erred in finding certain mild and moderate limitations in the  
16 "paragraph B" criteria at step three, and yet failing to account for those limitations in the RFC  
17 assessment. (Dkt. # 14 at 13-14.) This argument rests on a misapprehension of the difference  
18 between the step-three inquiry and the RFC assessment: at step three, the ALJ considers the  
19 severity of the medically determinable impairments, while the RFC is formulated to define the  
20 most the claimant can do despite the limitations caused by his or her impairments. *See* Social  
21 Security Ruling 96-8p, 1996 WL 374184, at \*4 (Jul. 2, 1996) ("The adjudicator must remember  
22 that the limitations identified in the "paragraph B" and "paragraph C" criteria are not an RFC  
23 assessment but are used to rate the severity of mental impairment(s) at steps 2 and 3 of the



1 sequential evaluation process.”); 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1) (RFC “is the most  
2 you can still do despite your limitations”).

3 Plaintiff goes on to posit that various limitations should have been included in the ALJ’s  
4 RFC assessment, but cites no credited evidence establishing the existence of those limitations.  
5 (Dkt. # 14 at 14-16.) To the extent that Plaintiff relies on Dr. Wheeler’s opinions to establish  
6 those limitations, as explained *supra*, the ALJ properly discounted Dr. Wheeler’s opinions, and  
7 thus Plaintiff does not show error in the ALJ’s decision by pointing to Dr. Wheeler’s discredited  
8 opinions.

9 **D. The ALJ Erred at Step Five**

10 Plaintiff challenges the ALJ’s reliance on the specific jobs identified at the hearing by the  
11 vocational expert (“VE”) in reaching the step-five determination, specifically jobs requiring  
12 level-three reasoning, which Plaintiff argues exceeds her RFC. (Dkt. # 14 at 17.)

13 The ALJ’s RFC assessment limits Plaintiff to performing “detailed, but not complex,  
14 instructions.” AR at 20. A job with level-three reasoning requires a person to “[a]pply  
15 commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic  
16 form. Deal with problems involving several concrete variables in or from standardized  
17 situations.” Dictionary of Occupational Titles (“DOT”), App. C. The DOT’s reference to  
18 multiple variables suggests a degree of complexity beyond that contemplated in the RFC  
19 assessment. Indeed, many district courts in the Ninth Circuit have explicitly found an RFC  
20 restriction similar to Plaintiff’s to be incompatible with level-three reasoning, although the Ninth  
21 Circuit itself has not ruled on this issue. *See Pugh v. Comm’r of Social Sec.*, 2019 WL 3936192,  
22 at \*5 (E.D. Cal. Aug. 20, 2019) (collecting cases).

1 The *Pugh* court did acknowledge a case from this district finding that a limitation to  
2 simple and detailed tasks was compatible with level-three reasoning, but *Pugh* found its  
3 reasoning unpersuasive. 2019 WL 3936192, at \*5 (citing *Hockett v. Colvin*, 2017 WL 218801, at  
4 \*2 (W.D. Wash. Jan. 19, 2017)). The Court also finds *Hockett*'s reasoning to be unpersuasive  
5 here, because Plaintiff's RFC explicitly restricted her from complex instructions, where as the  
6 claimant in *Hockett* was found to be able to perform simple and detailed tasks, without any  
7 specific limitation as to complexity. *See* 2017 WL 218801, at \*1. It is the ALJ's explicit finding  
8 that Plaintiff could not carry out complex instructions that suggests a conflict with level-three  
9 reasoning here.

10 The Commissioner contends that *Meissl v. Barnhart* supports affirming the ALJ's  
11 decision (dkt. # 15 at 12-13), but *Meissl* is inapposite. In *Meissl*, the claimant was restricted to  
12 performing simple tasks at a routine or repetitive pace, and the court found that restriction to be  
13 compatible with level-two reasoning. 403 F.Supp.2d 981, 983-84 (C.D. Cal. 2005). The RFC  
14 restrictions in this case are distinguishable from those in *Meissl*, and the issue presented here is  
15 whether the RFC restrictions are consistent with level-*three* reasoning. Thus, *Meissl* does not  
16 resolve the issue presented to this Court.

17 Under these circumstances, the Court finds that there is an apparent conflict between the  
18 ALJ's RFC assessment and the DOT definitions of most<sup>3</sup> of the jobs relied upon at step five, and  
19 the ALJ erred in failing to address this conflict at the hearing or in the decision. *See also Pinto v.*  
20 *Massanari*, 249 F.3d 840, 847 (9th Cir. 2001) ("We merely hold that in order for an ALJ to rely

---

21  
22 <sup>3</sup> *See* DOT 249.587-018, 1991 WL 672349 (Jan. 1, 2016) (document preparer); DOT 299.357-014, 1991  
23 WL 672624 (Jan. 1, 2016) (telephone solicitor); DOT 237.367-010, 1991 WL 672185 (appointment clerk);  
DOT 379.367-010, 1991 WL 673244 (Jan. 1, 2016) (surveillance system monitor). The ALJ did rely on  
one job requiring level-two reasoning, but this job does not exist in significant numbers in the national  
economy that Plaintiff can perform. *See* AR at 26 (discussing the addresser job). Thus, the error with  
respect to the jobs requiring level-three reasoning is not harmless.

1 on a job description in the [DOT] that fails to comport with a claimant's noted limitations, the  
2 ALJ must definitively explain this deviation.").

3 **V. CONCLUSION**

4 For the foregoing reasons, the Commissioner's final decision is REVERSED and this  
5 case is REMANDED for further administrative proceedings under sentence four of 42 U.S.C. §  
6 405(g). On remand, the ALJ should reconsider the step-five findings and obtain additional VE  
7 testimony if needed, and revisit any other parts of the decision as necessary.

8 Dated this 26th day of February, 2020.

9  
10 

11 MICHELLE L. PETERSON  
12 United States Magistrate Judge  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23